APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 81-1925, 81-1926

EVRA CORPORATION, formerly Hyman-Michaels Company, Plaintiff-Appellee and Counterplaintiff-Appellant,

v.

SWISS BANK CORPORATION, Denfendant-Appellant and Third-Party-Plaintiff-Appellant,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO, Third-Party-Defendant-Appellee and Counterdefendant-Appellee.

Argued Feb. 17, 1982.

Decided March 19, 1982.

Before SWYGERT, Senior Circuit Judge, and WOOD and POSNER, Circuit Judges.

POSNER, Circuit Judge.

The question—one of first impression—in this diversity case is the extent of a bank's liability for failure to make a transfer of funds when requested by wire to do so. The essential facts are undisputed. In 1972 Hyman-Michaels Company, a large Chicago dealer in scrap metal, entered into a two-year contract to supply steel scrap to a Brazilian corporation. Hyman-Michaels chartered a ship, the *Pandora*, to carry the scrap to Brazil. The charter was for one year, with an option to extend the charter for a second year; specified a fixed daily rate of pay for the hire of the ship during both the initial and the option period, payable semi-monthly "in advance"; and provided that if payment was not made on time the *Pandora's* owner could cancel the charter. Payment was to be made by deposit to the owner's account in the Banque de Paris et des Pays-Bas (Suisse) in Geneva, Switzerland.

The usual method by which Hyman-Michaels, in Chicago, got the payments to the Banque de Paris in Geneva was to request the Continental Illinois National Bank and Trust Company of Chicago, where it had an account, to make a wire transfer of funds. Continental would debit Hyman-Michaels' account by the amount of the payment and then send a telex to its London office for retransmission to its correspondent bank in Geneva—Swiss Bank Corporation—asking Swiss Bank to deposit this amount in the Banque de Paris account of the *Pandora's* owner. The transaction was completed by the crediting of Swiss Bank's account at Continental by the same amount.

When Hyman-Michaels chartered the *Pandora* in June 1972, market charter rates were very low, and it was these

rates that were fixed in the charter for its entire term—two years if Hyman-Michaels exercised its option. Shortly after the agreement was signed, however, charter rates began to climb and by October 1972 they were much higher than they had been in June. The *Pandora's* owners were eager to get out of the charter if they could. At the end of October they thought they had found a way, for the payment that was due in the Banque de Paris on October 26 had not arrived by October 30, and on that day the *Pandora's* owner notified Hyman-Michaels that it was canceling the charter because of the breach of the payment term. Hyman-Michaels had mailed a check for the October 26 installment to the Banque de Paris rather than use the wire-transfer method of payment. It had done this in order to have the use of its money for the period that it would take the check to clear, about two weeks. But the check had not been mailed in Chicago until October 25 and of course did not reach Geneva on the twenty-sixth.

When Hyman-Michaels received notification that the charter was being canceled it immediately wired payment to the Banque de Paris, but the *Pandora's* owner refused to accept it and insisted that the charter was indeed canceled. The matter was referred to arbitration in accordance with the charter. On December 5, 1972, the arbitration panel ruled in favor of Hyman-Michaels. The panel noted that previous arbitration panels had "shown varying degrees of latitude to Charterers"; "In all cases, a pattern of obligation on Owners' part to protest, complain, or warn of intended withdrawal was expressed as an essential prerequisite to withdrawal, in spite of the clear wording of the operative clause. No such advance notice was given by Owners of M/V Pandora." One of the three members of the panel dissented; he thought the *Pandora's* owner was entitled to cancel.

Hyman-Michaels went back to making the charter payments by wire transfer. On the morning of April 25, 1973, it telephoned Continental Bank and requested it to transfer $27,000 to the Banque de Paris account of the *Pandora's* owner in payment for the charter hire period from April 27 to May 11, 1973. Since the charter provided for payment "in advance," this payment arguably was due by the close of business on April 26. The requested telex went out to Continental's London office on the afternoon of April 25, which was nighttime in England. Early the next morning a telex operator in Continental's London office dialed, as Continental's Chicago office had instructed him to do, Swiss Bank's general telex number, which rings in the bank's cable department. But that number was busy, and after trying unsuccessfully for an hour to engage it the Continental telex operator dialed another number, that of a machine in Swiss Bank's foreign exchange department which he had used in the past when the general number was engaged. We know this machine received the telexed message because it signaled the sending machine at both the beginning and end of the transmission that the telex was being received. Yet Swiss Bank failed to comply with the payment order, and no transfer of funds was made to the account of the *Pandora's* owner in the Banque de Paris.

No one knows exactly what went wrong. One possibility is that the receiving telex machine had simply run out of paper, in which event it would not print the message although it had received it. Another is that whoever took the message out of the machine after it was printed failed to deliver it to the banking department. Unlike the machine in the cable department that the Continental telex operator had originally tried to reach, the machines in the foreign exchange department were operated by junior foreign exchange dealers rather than by professional telex operators,

although Swiss Bank knew that messages intended for other departments were sometimes diverted to the telex machines in the foreign exchange department.

At 8:30 a.m. the next day, April 27, Hyman-Michaels in Chicago received a telex from the *Pandora's* owner stating that the charter was canceled because payment for the April 27-May 11 charter period had not been made. Hyman-Michaels called over to Continental and told them to keep trying to effect payment through Swiss Bank even if the *Pandora's* owner rejected it. This instruction was confirmed in a letter to Continental dated April 28, in which Hyman-Michaels stated: "please instruct your London branch to advise their correspondents to persist in attempting to make this payment. This should be done even in the face of a rejection on the part of Banque de Paris to receive this payment. It is paramount that in order to strengthen our position in an arbitration that these funds continue to be readily available." Hyman-Michaels did not attempt to wire the money directly to the Banque de Paris as it had done on the occasion of its previous default. Days passed while the missing telex message was hunted unsuccessfully. Finally Swiss Bank suggested to Continental that it retransmit the telex message to the machine in the cable department and this was done on May 1. The next day Swiss Bank attempted to deposit the $27,000 in the account of the *Pandora's* owner at the Banque de Paris but the payment was refused.

Again the arbitrators were convened and rendered a decision. In it they ruled that Hyman-Michaels had been "blameless" up until the morning of April 27, when it first learned that the Banque de Paris had not received payment on April 26, but that "being faced with this situation," Hyman-Michaels had "failed to do everything in [its] power to remedy it. The action taken was immediate but did not prove to be adequate, in that [Continental] Bank

and its correspondent required some 5/6 days to trace and effect the lost instruction to remit. [Hyman-Michaels] could have ordered an immediate duplicate payment—or even sent a Banker's check by hand or special messengers, so that the funds could have reached owner's bank, not later than April 28th." By failing to do any of these things Hyman-Michaels had "created the opening" that the *Pandora's* owner was seeking in order to be able to cancel the charter. It had "acted imprudently." The arbitration panel concluded, reluctantly but unanimously, that this time the *Pandora's* owner was entitled to cancel the agreement. The arbitration decision was confirmed by a federal district court in New York.

Hyman-Michaels then brought this diversity action against Swiss Bank, seeking to recover its expenses in the second arbitration proceeding plus the profits that it lost because of the cancellation of the charter. The contract by which Hyman-Michaels had agreed to ship scrap steel to Brazil had been terminated by the buyer in March 1973 and Hyman-Michaels had promptly subchartered the *Pandora* at market rates, which by April 1973 were double the rates fixed in the charter. Its lost profits are based on the differences between the charter and subcharter rates.

Swiss Bank impleaded Continental Bank as a third-party defendant, asking that if it should be ordered to pay Hyman-Michaels, then Continental should be ordered to indemnify it. Continental filed a cross-claim against Hyman-Michaels seeking to shift back to Hyman-Michaels the cost of any judgment that Swiss Bank might obtain against it, on the ground that any errors by Continental were caused by Hyman-Michaels' negligence. Hyman-Michaels in turn counterclaimed against Continental, alleging that Continental had both been negligent and broken its contract with Hyman-Michaels in failing to effect payment on April 26, and

was therefore liable to Hyman-Michaels along with Swiss Bank.

The case was tried to a district judge without a jury. In his decision, 522 F.Supp. 820 (N.D.Ill.1981), he first ruled that the substantive law applicable to Hyman-Michaels' claim against Swiss Bank was that of Illinois, rather than Switzerland as urged by Swiss Bank, and that Swiss Bank had been negligent and under Illinois law was liable to Hyman-Michaels for $2.1 million in damages. This figure was made up of about $16,000 in arbitration expenses and the rest in lost profits on the subcharter of the *Pandora*. The judge also ruled that Swiss Bank was not entitled to indemnification from Continental Bank, which made Continental's cross-claim moot; and lastly he dismissed Hyman-Michaels' counterclaim against Continental on the ground that Continental had not breached any duty to Hyman-Michaels. The case comes to us on Swiss Bank's appeal from the judgment in favor of Hyman-Michaels and from the dismissal of Swiss Bank's claim against Continental Bank, and on Hyman-Michaels' appeal from the dismissal of its counterclaim against Continental Bank.

Logically the first question we should address is choice of law. The parties seem agreed that if Swiss law applies, Hyman-Michaels has no claim against Swiss Bank, because under Swiss law a bank cannot be held liable to someone with whom it is not in privity of contract and there was no contract between Swiss Bank and Hyman-Michaels. Illinois does not have such a privity requirement. But this creates a conflict of laws only if Hyman-Michaels has a good claim against Swiss Bank under Illinois law; if it does not, then our result must be the same regardless of which law applies. Because we are more certain that Hyman-Michaels cannot recover against Swiss Bank under Illinois law than we are

that Swiss rather than Illinois law applies to this case under Illinois choice-of-law principles (which we must apply in a diversity suit tried in Illinois, see *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496-97, 61 S.Ct. 1020, 1021-22, 85 L.Ed. 1477 (1941)), we shall avoid the choice-of-law question and discuss Swiss Bank's liability to Hyman-Michaels under Illinois law without deciding—for, to repeat, it would make no difference to the outcome—whether it really is Illinois law or Swiss law that governs.

When a bank fails to make a requested transfer of funds, this can cause two kinds of loss. First, the funds themselves or interest on them may be lost, and of course the fee paid for the transfer, having bought nothing, becomes a loss item. These are "direct" (sometimes called "general") damages. Hyman-Michaels is not seeking any direct damages in this case and apparently sustained none. It did not lose any part of the $27,000; although its account with Continental Bank was debited by this amount prematurely, it was not an interest-bearing account so Hyman-Michaels lost no interest; and Hyman-Michaels paid no fee either to Continental or to Swiss Bank for the aborted transfer. A second type of loss, which either the payor or the payee may suffer, is a dislocation in one's business triggered by the failure to pay. Swiss Bank's failure to transfer funds to the Banque de Paris when requested to do so by Continental Bank set off a chain reaction which resulted in an arbitration proceeding that was costly to Hyman-Michaels and in the cancellation of a highly profitable contract. It is those costs and lost profits—"consequential" or, as they are sometimes called, "special" damages—that Hyman-Michaels seeks in this lawsuit, and recovered below. It is conceded that if Hyman-Michaels was entitled to consequential damages, the district court measured them correctly. The only issue is whether it was entitled to consequential damages.

If a bank loses a check, its liability is governed by Article 4 of the Uniform Commercial Code, which precludes consequential damages unless the bank is acting in bad faith. See Ill.Rev.Stat. ch. 26, § 4-103(5). If Article 4 applies to this transaction, Hyman-Michaels cannot recover the damages that it seeks, because Swiss Bank was not acting in bad faith. Maybe the language of Article 4 could be stretched to include electronic fund transfers, see section 4-102(2), but they were not in the contemplation of the draftsmen. For purposes of this case we shall assume, as the Second Circuit held in *Delbrueck & Co. v. Manufacturers Hanover Trust Co.*, 609 F.2d 1047, 1051 (2d Cir. 1979), that Article 4 is inapplicable, and apply common law principles instead.

Hadley v. Baxendale, 9 Ex. 341, 156 Eng. Rep. 145 (1854), is the leading common law case on liability for consequential damages caused by failure or delay in carrying out a commercial undertaking. The engine shaft in plaintiffs' corn mill had broken and they hired the defendants, a common carrier, to transport the shaft to the manufacturer, who was to make a new one using the broken shaft as a model. The carrier failed to deliver the shaft within the time promised. With the engine shaft out of service the mill was shut down. The plaintiffs sued the defendants for the lost profits of the mill during the additional period that it was shut down because of the defendants' breach of their promise. The court held that the lost profits were not a proper item of damages, because "in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences [the stoppage of the mill and resulting loss of profits] would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants." 9 Ex. at 356, 156 Eng.Rep. at 151.

The rule of *Hadley* v. *Baxendale*—that consequential damages will not be awarded unless the defendant was put on notice of the special circumstances giving rise to them—has been applied in many Illinois cases, and *Hadley* cited approvingly. See, e.g., *Underground Constr. Co. v. Sanitary Dist. of Chicago*, 367 Ill. 360, 369, 11 N.E.2d 361, 365 (1937); *Western Union Tel. Co. v. Martin*, 9 Ill.App. 587, 591-93 (1882); *Siegel v. Western Union Tel. Co.*, 312 Ill.App. 86, 92-93, 37 N.E.2d 868, 871 (1941); *Spangler v. Holthusen*, 61 Ill.App.3d 74, 80-82, 18 Ill.Dec. 840, 378 N.E.2d 304, 309-10 (1978). In *Siegel*, the plaintiff had delivered $200 to Western Union with instructions to transmit it to a friend of the plaintiff's. The money was to be bet (legally) on a horse, but this was not disclosed in the instructions. Western Union misdirected the money order and it did not reach the friend until several hours after the race had taken place. The horse that the plaintiff had intended to bet on won and would have paid $1650 on the plaintiff's $200 bet if the bet had been placed. He sued Western Union for his $1450 lost profit, but the court held that under the rule of *Hadley v. Baxendale* Western Union was not liable, because it "had no notice or knowledge of the purpose for which the money was being transmitted." 312 Ill.App. at 93, 37 N.E.2d at 871.

[1] The present case is similar, though Swiss Bank knew more than Western Union knew in *Siegel*; it knew or should have known, from Continental Bank's previous telexes, that Hyman-Michaels was paying the Pandora Shipping Company for the hire of a motor vessel named *Pandora*. But it did not know when payment was due, what the terms of the charter were, or that they had turned out to be extremely favorable to Hyman-Michaels. And it did not know that Hyman-Michaels knew the *Pandora's* owner would try to cancel the charter, and probably would succeed, if Hyman-Michaels was ever again late in making payment,

or that despite this peril Hyman-Michaels would not try to pay until the last possible moment and in the event of a delay in transmission would not do everything in its power to minimize the consequences of the delay. Electronic funds transfers are not so unusual as to automatically place a bank on notice of extraordinary consequences if such a transfer goes awry. Swiss Bank did not have enough information to infer that if it lost a $27,000 payment order it would face a liability in excess of $2 million. Cf. *Snell v. Cottingham*, 72 Ill. 161, 169-70 (1874); *Flug v. Craft Mfg. Co.*, 3 Ill.App.2d 56, 67, 120 N.E.2d 666, 671 (1954).

It is true that in both *Hadley* and *Siegel* there was a contract between the parties and here there was none. We cannot be certain that the Illinois courts would apply the principles of those cases outside of the contract area. As so often in diversity cases, there is an irreducible amount of speculation involved in attempting to predict the reaction of a state's courts to a new issue. The best we can do is to assume that the Illinois courts would look to the policies underlying cases such as *Hadley* and *Siegel* and, to the extent they found them pertinent, would apply those cases here. We must therefore ask what difference it should make whether the parties are or are not bound to each other by a contract. On the one hand, it seems odd that the absence of a contract would enlarge rather than limit the extent of liability. After all, under Swiss law the absence of a contract would be devastating to Hyman-Michaels' claim. Privity is not a wholly artificial concept. It is one thing to imply a duty to one with whom one has a contract and another to imply it to the entire world.

On the other hand, contract liability is strict. A breach of contract does not connote wrongdoing; it may have been caused by circumstances beyond the promisor's control—

a strike, a fire, the failure of a supplier to deliver an essential input. See *Globe Ref. Co. v. Landa Cotton Oil Co.*, 190 U.S. 540, 543-44, 23 S.Ct. 754, 755-56, 47 L.Ed. 1171 (1903). And while such contract doctrines as impossibility, impracticability, and frustration relieve promisors from liability for some failures to perform that are beyond their control, many other such failures are actionable although they could not have been prevented by the exercise of due care. The district judge found that Swiss Bank had been negligent in losing Continental Bank's telex message and it can be argued that Swiss Bank should therefore be liable for a broader set of consequences than if it had only broken a contract. But *Siegel* implicitly rejects this distinction. Western Union had not merely broken its contract to deliver the plaintiff's money order; it had "negligently misdirected" the money order. "The company's negligence is conceded." 312 Ill.App. at 88, 91, 37 N.E.2d at 869, 871. Yet it was not liable for the consequences.

Siegel, we conclude, is authority for holding that Swiss Bank is not liable for the consequences of negligently failing to transfer Hyman-Michaels' funds to Banque de Paris; reason for such a holding is found in the animating principle of *Hadley v. Baxendale*, which is that the costs of the untoward consequence of a course of dealings should be borne by that party who was able to avert the consequence at least cost and failed to do so. In *Hadley* the untoward consequence was the shutting down of the mill. The carrier could have avoided it by delivering the engine shaft on time. But the mill owners, as the court noted, could have avoided it simply by having a spare shaft. 9 Ex. at 355-56, 156 Eng.Rep. at 151. Prudence required that they have a spare shaft anyway, since a replacement could not be obtained at once even if there was no undue delay in carting the broken shaft to and the replacement shaft from the

manufacturer. The court refused to imply a duty on the part of the carrier to guarantee the mill owners against the consequences of their own lack of prudence, though of course if the parties had stipulated for such a guarantee the court would have enforced it. The notice requirement of *Hadley v. Baxendale* is designed to assure that such an improbable guarantee really is intended.

This case is much the same, though it arises in a tort rather than a contract setting. Hyman-Michaels showed a lack of prudence throughout. It was imprudent for it to mail in Chicago a letter that unless received the next day in Geneva would put Hyman-Michaels in breach of a contract that was very profitable to it and that the other party to the contract had every interest in canceling. It was imprudent thereafter for Hyman-Michaels, having narrowly avoided cancellation and having (in the words of its appeal brief in this court) been "put . . . on notice that the payment provision of the Charter would be strictly enforced thereafter," to wait till arguably the last day before payment was due to instruct its bank to transfer the necessary funds overseas. And it was imprudent in the last degree for Hyman-Michaels, when it received notice of cancellation on the last possible day payment was due, to fail to pull out all the stops to get payment to the Banque de Paris on that day, and instead to dither while Continental and Swiss Bank wasted five days looking for the lost telex message. Judging from the obvious reluctance with which the arbitration panel finally decided to allow the *Pandora's* owner to cancel the charter, it might have made all the difference if Hyman-Michaels had gotten payment to the Banque de Paris by April 27 or even by Monday, April 30, rather than allowed things to slide until May 2.

This is not to condone the sloppy handling of incoming telex messages in Swiss Bank's foreign department. But

Hyman-Michaels is a sophisticated business enterprise. It knew or should have known that even the Swiss are not infallible; that messages sometimes get lost or delayed in transit among three banks, two of them located 5000 miles apart, even when all the banks are using reasonable care; and that therefore it should take its own precautions against the consequences—best known to itself—of a mishap that might not be due to anyone's negligence.

We are not the first to remark the affinity between the rule of *Hadley v. Baxendale* and the doctrine, which is one of tort as well as contract law and is a settled part of the common law of Illinois, of avoidable consequences. See Dobbs, Handbook on the Law of Remedies 831 (1973); cf. *Benton v. J. A. Fay & Co.*, 64 Ill. 417 (1872). If you are hurt in an automobile accident and unreasonably fail to seek medical treatment, the injurer, even if negligent, will not be held liable for the aggravation of the injury due to your own unreasonable behavior after the accident. See, e.g., *Slater v. Chicago Transit Auth.*, 5 Ill.App.2d 181, 185, 125 N.E.2d 289, 291 (1955). If in addition you failed to fasten your seat belt, you may be barred from collecting the tort damages that would have been prevented if you had done so. See, e.g., *Mount v. McClellan*, 91 Ill.App.2d 1, 5, 234 N.E.2d 329, 331 (1968). Hyman-Michaels' behavior in steering close to the wind prior to April 27 was like not fastening one's seat belt; its failure on April 27 to wire a duplicate payment immediately after disaster struck was like refusing to seek medical attention after a serious accident. The seat-belt cases show that the doctrine of avoidable consequences applies whether the tort victim is committed. See Prosser, Handbook of the Law of Torts 424 (4th ed. 1971). Hyman-Michaels did both.

The rule of *Hadley v. Baxendale* links up with tort concepts in another way. The rule is sometimes stated in the

form that only foreseeable damages are recoverable in a breach of contract action. E.g., Restatement (Second) of Contracts § 351 (1979). So expressed, it corresponds to the tort principle that limits liability to the foreseeable consequence of the defendant's carelessness. See, e.g., *Neering v. Illinois Cent. R.R. Co.*, 383 Ill. 366, 380, 50 N.E.2d 497, 503 (1943). The amount of care that a person ought to take is a function of the probability and magnitude of the harm that may occur if he does not take care. See, e.g., *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); *Bezark v. Kostner Manor, Inc.*, 29 Ill.App.2d 106, 111-12, 172 N.E.2d 424, 426-27 (1961). If he does not know what that probability and magnitude are, he cannot determine how much care to take. That would be Swiss Bank's dilemma if it were liable for consequential damages from failing to carry out payment orders in timely fashion. To estimate the extent of its probable liability in order to know how many and how elaborate fail-safe features to install in its telex rooms or how much insurance to buy against the inevitable failures, Swiss Bank would have to collect reams of information about firms that are not even its regular customers. It had no banking relationship with Hyman-Michaels. It did not know or have reason to know how at once precious and fragile Hyman-Michaels' contract with the *Pandora's* owner was. These were circumstances too remote from Swiss Bank's practical range of knowledge to have affected its decisions as to who should man the telex machines in the foreign department or whether it should have more intelligent machines or should install more machines in the cable department, any more than the falling of a platform scale because a conductor jostled a passenger who was carrying fireworks was a prospect that could have influenced the amount of care taken by the Long Island Railroad. See *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 162 N.E. 99 (1928); cf. *Ney v. Yellow Cab Co.*, 2 Ill.2d 74, 80-84, 117 N.E.2d 74, 78-80 (1954).

In short, Swiss Bank was not required in the absence of a contractual undertaking to take precautions or insure against a harm that it could not measure but that was known with precision to Hyman-Michaels, which could by the exercise of common prudence have averted it completely. As Chief Judge Cardozo (the author of *Palsgraf*) remarked in discussing the application of *Hadley v. Baxendale* to the liability of telegraph companies for errors in transmission, "The sender can protect himself by insurance in one form or another if the risk of nondelivery or error appears to be too great. . . . The company, if it takes out insurance for itself, can do no more than guess at the loss to be avoided." *Kerr S.S. Co. v. Radio Corp. of America*, 245 N.Y. 284, 291-92, 157 N.E. 140, 142 (1927).

But *Kerr* is a case from New York, not Illinois, and Hyman-Michaels argues that two early Illinois telegraph cases compel us to rule in its favor against Swiss Bank. *Postal Tel Cable Co. v. Lathrop*, 131 Ill. 575, 23 N.E. 583 (1890), involved the garbled transmission of two telegrams from a coffee dealer—who as the telegraph company knew was engaged in buying and selling futures contracts—to his broker. The first telegram (there is no need to discuss the second) directed the broker to buy 1000 bags of August coffee for the dealer's account. This got changed in transmission to 2000 bags, and because the price fell the dealer sustained an extra loss for which he sued the telegraph company. The court held that the company had had notice enough to make it liable for consequential damages under the rule of *Hadley v. Baxendale*. It knew it was transmitting buy and sell orders in a fluctuating market and that a garbled transmission could result in large losses. There was no suggestion that the dealer should have taken his own precautions against such mistakes. In *Providence-Washington Ins. Co. v. Western Union Tel. Co.*, 247 Ill. 84, 93 N.E. 134 (1910), a telegram from an insurance company cancel-

ing a policy was misdirected, and before it turned up there was a fire and the insurance company was liable on the policy. This was the precise risk created by delay, it was obvious on the face of the telegram, and the telegraph company was therefore liable for the insurance company's loss on the policy. Again there was no suggestion that the plaintiff had neglected any precaution. Both cases are distinguishable from the present case: the defendants had more information and the plaintiffs were not imprudent.

The legal principles that we have said are applicable to this case were not applied below. Although the district judge's opinion is not entirely clear, he apparently thought the rule of *Hadley v. Baxendale* inapplicable and the imprudence of Hyman-Michaels irrelevant. See 522 F.Supp. at 833. He did state that the damages to Hyman-Michaels were foreseeable because "a major international bank" should know that a failure to act promptly on a telexed request to transfer funds could cause substantial damage; but *Siegel*—and for that matter *Lathrop* and *Providence-Washington*—make clear that that kind of general foreseeability, which is present in virtually every case, does not justify an award of consequential damages.

We could remand for new findings based on the proper legal standard, but it is unnecessary to do so. The undisputed facts, recited in this opinion, show as a matter of law that Hyman-Michaels is not entitled to recover consequential damages from Swiss Bank.

Since Hyman-Michaels' complaint against Swiss Bank must be dismissed, Swiss Bank's third-party complaint against Continental Bank and Continental Bank's cross-claim against Hyman-Michaels are moot. That leaves only Hyman-Michaels' counterclaim against Continental Bank still to be considered. Although it puts us in the peculiar position of deciding a case between two citizens of Illinois

that involves only Illinois law, the counterclaim is within our ancillary jurisdiction. Continental Bank's complaint against Hyman-Michaels—a third-party defendant's complaint against the original plaintiff, arising out of the same transaction as the original suit, see Fed.R.Civ.P. 14(a)—is within that jurisdiction, *Mayer Paving & Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 768, 772 (7th Cir. 1973), and Hyman-Michaels' counterclaim against Continental, being a compulsory counterclaim, did not require an independent federal jurisdictional basis and is therefore also within our ancillary jurisdiction.

[2] It is true that if Hyman-Michaels' claim against Continental had been based on Rule 14(a) rather than Rule 13(a), it would have required an independent federal jurisdictional basis. *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 98 S.Ct. 2396, 57 L.Ed.2d 274 (1978). But there is no inconsistency. A plaintiff cannot confer federal jurisdiction to decide a state-law claim by asserting such a claim under Rule 14(a) against a third-party defendant who is a citizen of the same state, when if he had sued that party originally he would have had to bring his entire suit in state court because complete diversity would have been lacking. See 437 U.S. at 374-75, 98 S.Ct. at 2402-03. But so far as appears Hyman-Michaels did not want to sue Continental Bank originally; it was induced to do so by Continental's claim against it. That claim was within the ancillary jurisdiction of the federal courts because, like a compulsory counterclaim, it arose out of the same transaction as Hyman-Michaels' claim against Swiss Bank, which was indirectly a claim against Continental via Swiss Bank's indemnity claim against Continental. See *Revere Copper & Brass Inc. v. Aetna Cas. & Sur. Co.*, 426 F.2d 709, 716 (5th Cir. 1970). And Hyman-Michaels' claim against Continental, which *was* a compulsory counterclaim, did not require an independent jurisdictional basis. See *Moore v. New*

York Cotton Exch., 270 U.S. 593, 46 S.Ct. 367, 70 L.Ed. 750 (1926). Continental may not invoke the jurisdiction of the federal courts in order to bring a state-law claim against a nondiverse party and then use the lack of diversity to force that party to bring its identical claim against Continental in a state court.

[3] On the merits, we agree with the district judge that Hyman-Michaels did not prove its case. Continental did not break any contract with Hyman-Michaels. All it undertook to do on April 25 was to transmit a telex message to Swiss Bank, and it did so. All it undertook to do on April 27, by the evidence of Hyman-Michaels' own confirming letter, was to advise its correspondent—that is, Swiss Bank—to "persist in attempting to make . . . payment," and it did so advise its correspondent. Nor was Continental negligent on either occasion. Its telex operator had used the machine in Swiss Bank's foreign department before, for the same purpose and without incident; he had no reason to expect a mishap. And Continental used due care in assisting Swiss Bank in the latter's vain hunt for the missing telex. The district court's findings on these issues were skimpy but the facts are clear and a remand is unnecessary.

No other issues need be decided. The judgment in favor of Hyman-Michaels against Swiss Bank is reversed with directions to enter judgment for Swiss Bank. The judgment in favor of Continental Bank on Swiss Bank's third-party complaint is vacated with instructions to dismiss that complaint as moot. The judgment dismissing Continental's cross-claim against Hyman-Michaels as moot, and the judgment in favor of Continental on Hyman-Michaels' counterclaim, are affirmed. The costs of the appeals shall be borne by Hyman-Michaels (Evra Corporation).

SO ORDERED.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 73 C 2643

EVRA CORPORATION, formerly known as
Hyman-Michaels Company, Plaintiff,

v.

SWISS BANK CORPORATION,
a Swiss corporation, Defendant and
Third-Party Plaintiff,

v.

CONTINENTAL ILLINOIS NATIONAL BANK AND
TRUST COMPANY OF CHICAGO,
a national banking association, Third-Party Defendant.

May 12, 1981.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

ROSZKOWSKI, District Judge.

This matter comes before the court for a ruling following a bench trial beginning on August 18, 1980 and ending on August 28, 1980.

Plaintiff, EVRA Corporation, formerly known as Hyman-Michaels Company ("Hyman-Michaels"), brought this civil action against Swiss Bank Corporation ("Swiss Bank") for its failure to promptly make payment of an installment of ship charter hire in accordance with a telex request sent by Continental Illinois National Bank and Trust Company of Chicago ("Continental"). Hyman-Michaels' complaint alleges breach of contract negligence and breach of fiduciary duty.

Swiss Bank, pursuant to Rule 14(a) of the Federal Rules of Civil Procedure ("F.R.Civ.P."), joined Continental as a third-party defendant on the grounds that Continental is or may be liable to Swiss Bank for all or part of plaintiff's claim against it. Continental in turn filed a counterclaim against Hyman-Michaels, seeking recovery from Hyman-Michaels for all or part of the damages for which Continental might be found liable to Swiss Bank.

Hyman-Michaels, pursuant to Rules 13(a) and 14, F.R. Civ.P., filed a counterclaim against Continental for its alleged wrong-doing in connection with the transaction in question.[1] Hyman-Michaels seeks recovery from Continental under theories of negligence, breach of contract, and breach of fiduciary duty.

Jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1332.

After a thorough examination of the entire record of this action, the court makes the following Findings of Fact and Conclusions of Law.

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[1] On August 13, 1980, this court denied Continental's motion to dismiss the counterclaim filed by Hyman-Michaels, 496 F.Supp. 663. On August 18, 1980, Continental moved to have its counterclaim treated as an affirmative defense. This motion is pending before the court.

FINDINGS OF FACT[3]

In 1973, Hyman-Michaels was an Illinois corporation with its principal place of business at Chicago, Illinois. It was engaged in the international and domestic purchase and sale of scrap metals and oceanic freighter shipping.

In 1976, Hyman-Michaels sold its scrap metal business to Azcon Corporation and at the same time changed its name to EVRA Corporation.

Swiss Bank is a Swiss corporation with its principal office in Basle, Switzerland. It is a major international bank with offices throughout the world.

Continental is a national banking association with its principal place of business located in Chicago, Illinois. Continental is also a major international bank with offices throughout the world.

In April, 1972, Hyman-Michaels entered into a written contract to sell and deliver a quantity of steel scrap to a Brazilian corporation over a period of two years. The contract provided that the purchaser could decline to purchase scrap if its price exceeded a certain amount. Hyman-Michaels entered into a joint venture agreement with the Schiavone-Bonomo Corporation for the performance of the Brazilian contract under which Schiavone-Bonomo was to provide a portion of the steel scrap and Hyman-Michaels was to provide the ships to transport the scrap.

In June, 1972, Hyman-Michaels entered into a standard form time charter ("Charter") with the Pandora Shipping Company for a ship known as the "Pandora" intending, among other things, to use it in delivering the scrap metal under the Brazilian contract. The Charter was for one year, with two successive six-month options exercisable by Hyman-Michaels.

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[3] Any finding of fact which may be more properly termed a conclusion of law shall be deemed a conclusion of law.

The Charter rate for the vessel for the first twelve months was $1,825 a day, to be paid semi-monthly "in advance" to the account of Pandora Shipping Company at Banque de Paris et des Pays-Bas (Suisse) SA, Geneva, Switzerland ("Banque de Paris"). The daily Charter rates for the successive six-month option periods were $1,925 for the first six-month period and $2,050 for the second. The Charter provided that if Hyman-Michaels failed to pay the hire in advance, the owner was at liberty to withdraw the vessel from Hyman-Michaels' service.

The Pandora was delivered to Hyman-Michaels' service on July 27, 1972 at 2100 hours.

Hyman-Michaels made the payments of the first through fifth and eighth through eighteenth installments of the Charter hire by wire transfers. Each of the wire transfers was made through Continental. Continental used Swiss Bank as its correspondent bank for the wire transfers of the first, fourth, fifth and eighth through eighteenth installment payments. All of these wire transfers were sent to and received by Swiss Bank's telex machine 22235.

In each instance when a Charter installment payment was made through Continental, Hyman-Michaels received after requesting such payment a document from Continental entitled "Receipt Non-Negotiable" (hereinafter referred to as Continental's "advice form").

At the time Hyman-Michaels entered into the Charter, charter rates were at the bottom of the market. By October, 1972, however, charter rates had gone up dramatically. The sharp uptrend continued throughout the remaining period of the Charter and the Charter option periods.

Hyman-Michaels made the payments of the sixth and seventh installments of the Charter hire by checks sent in the mail. On October 30, 1972, the owner of the Pandora notified Hyman-Michaels that it was withdrawing the

Pandora from the Charter because the seventh installment payment, due on October 26, had not been received by Banque de Paris. This attempted withdrawal of the Pandora was submitted to a panel of three arbitrators in accordance with the Charter. On December 5, 1972, the panel ruled that the owner of the Pandora could not withdraw her from the Charter, but put Hyman-Michaels on notice that the payment provision of the Charter would be strictly enforced thereafter.

Subsequent to the arbitration proceeding, Hyman-Michaels reverted to the use of wire transfers exclusively for the payment of the Charter installments. Beginning with the eighth installment payment, the procedure followed by Hyman-Michaels was to have its accounting department make a request to Continental to effect a wire transfer a few days before each Charter hire payment was due.

By March, 1973, the price of steel scrap under Hyman-Michaels' contract with the Brazilian corporation rose to such a level that the Brazilian corporation elected not to purchase any more scrap. Hyman-Michaels thus had the opportunity to subcharter the vessel on the open spot market. Hyman-Michaels entered into a subcharter for the Pandora under which it was to be loaded with grain at Baton Rouge, Louisiana on April 28, 1973 for delivery to Poland.

At or about 9:17 A.M. on April 25, 1973, Carlos Oliveros, an employee of Hyman-Michaels, telephoned Continental and requested that Continental make a wire transfer in the amount of $27,040.62 to the account of the Pandora's owner at Banque de Paris for the Charter hire period of April 27—May 11, 1973. Payment of this installment was due at or before 2100 hours (9 P.M.) Geneva time on April 27, 1973.

The requested telex message was prepared by Continental in Chicago. It was then forwarded at 4:36 P.M. (Chicago time) by telex to Continental's London Branch for retransmittal to Swiss Bank in Geneva. The telex message requested that retransmission be addressed to Swiss Bank's telex machine 22235.

Continental issued its standard Continental advice form to Hyman-Michaels for the wire transfer and Hyman-Michaels received it at or before 8:30 A.M. of April 27, 1973. This advice form confirmed to Hyman-Michaels that its account had been debited for $27,040.62 and that Continental was proceeding to execute the wire transfer.

Beginning at about 9 A.M. (London time) on April 26, 1973, Brian Brown, a telex operator employed by Continental's London Branch, tried to transmit the April 25 telex instruction to Swiss Bank's general telex number 22235. After trying unsuccessfully for almost an hour to reach the general number, Brown diverted the telex message to Swiss Bank's telex machine 22226, a number he had used in the past, which was located in Swiss Bank's Foreign Exchange Department.

In retransmitting the April 25 message from Continental's London Branch to Swiss Bank's machine 22226,[8] Brown received Swiss Bank's "answer-back" at the beginning and at the end of the message. In between the two "answer-backs", Brown had a clear copy of the message on his telex machine in London. Accordingly, the court finds that on April 26, 1973, at approximately 9:52 A.M. Geneva time, Swiss Bank received the retransmission of the April 25 message on its telex machine 22226B.

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[8] Although Brown dialed telex number 22226, the message was automatically routed to machine 22226B, one of several machines available to receive a message when telex number 22226 is reached.

Prior to April 27, 1973, Continental's London Branch had diverted several cables from the general telex machines at Swiss Bank to those in Swiss Bank's Foreign Exchange Department. In 1973, the Foreign Exchange Department was located on the same floor as, and next door to the Cable Department, in which telex machine 22235 was located. Swiss Bank never complained to Continental's London Branch about diversion to telex machine 22226 in the Foreign Exchange Department and never notified Continental not to use it.

Swiss bank's foreign exchange room telex machines would receive an average of three to four telexes per week destined for other departments of the bank. Swiss Bank had no procedure for logging these telexes or insuring that they were promptly acted upon.

In April, 1973, Swiss Bank's telex machine 22226B was not equipped to make copies of telex messages which it received. In addition, it did not automatically shut off when it ran out of paper, but continued to receive messages which were not recorded in any manner.

Swiss Bank had no systematic method of checking the telex machines in the foreign exchange room to see if they had paper. The machines were operated by junior foreign exchange dealers who were not professional telex operators.

Swiss Bank took no action whatsoever in response to the April 26, 1973 telex from Continental's London Branch. The court finds that Swiss Bank either (a) lost the April 25, 1973 telex message, or (b) failed to have paper in its machine 22226B at the time that the message was being received, in which case no actual copy of the message would have been produced.

At about 8:30 A.M. (Chicago time) on Friday, April 27, 1973, Hyman-Michaels received a telex message from the

owner of the Pandora stating that the owner had withdrawn the vessel from service under the Charter because the nineteenth installment had not been paid to its account at Banque de Paris.

Between 8:45 A.M. and 9 A.M., Albert Moeng of Hyman-Michaels contacted Richard Beutel of Continental, advising him of the owner's claimed non-receipt. Hyman-Michaels instructed Continental to instruct its correspondent, Swiss Bank, to persist in attempting to effect the payment even in the face of a rejection by the owner's bank.

Hyman-Michaels telephoned the owner's representative on the morning of April 27, 1973 and told him that payment had been made. The owner persisted in his decision to withdraw and notified Hyman-Michaels that all further attempts to effect payment would be rejected.

Hyman-Michaels' admiralty counsel at Hill, Betts & Nash of New York City were informed of the situation early on April 27. They contacted the owner's attorneys and, through negotiations with them, reached an agreement that day for the submission of the dispute concerning the withdrawal of the Pandora to arbitration.

After his telephone conversation with Moeng of Hyman-Michaels, Beutel of Continental contacted Tom Jarom, who handled customer assistance matters in the International Banking Department of the Continental Bank (Chicago). Beutel informed Jarom of the details of the transaction and instructed him to find out what had happened to the payment of the nineteenth installment.

Jarom first located the underlying documentation for the payment instruction. He reported to Beutel that he had confirmed that on April 25, 1973, Continental had debited Hyman-Michaels' account for $27,040.62, had credited Swiss

Bank's account for the same amount, and had sent a payment instruction to its London Branch for retransmission to Swiss Bank (Geneva).

Thereafter, between 10:30 A.M. and 11:00 A.M. (Chicago time), Jarom contacted Swiss Bank by telephone. He inquired as to receipt of the telex and was advised that Swiss Bank had no record of its receipt. Jarom asked if he could carry out the transfer by giving Swiss Bank the tested telex code and payment instructions over the telephone, but the Swiss Bank employee told Jarom it was too late (it being approximately 6:00 P.M. in Geneva at that time).

Jarom reported the results of his investigation to Beutel and Beutel, in turn, reported what he had learned to Moeng.

No further action was taken by any of the parties on Saturday, April 28 or Sunday, April 29, 1973. On Monday, April 30, 1973, at about 10:00 A.M. (Chicago time), Beutel telephoned Continental's Geneva representative, Larry Gibb. Beutel told Gibb the details of the April 25 wire transfer and instructed Gibb to try and find out what had happened to it.

On May 1, 1973, Gibb contacted Alain Roux, the head of Swiss Bank's foreign relations and cables departments, and asked him to trace the message. Roux conducted a search of the cables department and found no evidence of receipt.

Later in the day on May 1, Gibb recontacted Roux and advised him that Continental's London Branch had diverted the telex to Swiss Bank telex 22226B. Upon learning that the telex had been sent to 22226B, Roux directed Pierre Andre Adler, head of Swiss Bank's foreign exchange department, to search his department's records for evidence of the telex. Adler made two searches of his department's

files, including a separate file for all garbled messages; but found no trace of the April 25 telex message.

On May 1, 1973, Roux suggested to Continental that it re-transmit the telex to 22235, which Continental did during the afternoon of that day. Swiss Bank re-transmitted the May 1, 1973 telex to Banque de Paris on May 2, 1973.

On May 8 and 14, 1973, arbitration hearings were held in New York City. On May 21, 1973, the arbitrators held that the owner was entitled to withdraw the Pandora from the Charter. With respect to the root cause of the withdrawal, the arbitrators stated as follows:

> However, the Panel is unanimously of the opinion that the root cause of this situation did not lie with Charterers, as very definite proof was shown to the Panel that payment was properly made by Charterers in sufficient time on April 25th A.M., through their Bank, Continental Illinois Bank of Chicago; further that this Bank acting properly and expenditiously in accordance with established proven practice, instructed their correspondent Bank (Swiss Bank Corporation) in Geneva, Switzerland, by telex in due time to make the said payment to Owners' bank in Geneva, but that Swiss Bank Corporation, having acknowledged the message by teletype (answerback automatically received by Continental Illinois Bank) thereupon lost the said instructions and failed to make payment when due on April 26th or April 27th. Charterers were only made aware of this matter upon receipt of a message from Owners on April 27th at 8:30 A.M. Chicago time, that vessel was being withdrawn for nonpayment of the 19th hire installment. Up to this point, the Panel regards Charterers as blameless and having properly executed their Charter Party commitments and obligations in this matter. (Bank error being beyond their control).

On July 5, 1973, the arbitrators' decision was confirmed by the United States District Court for the Southern District of New York.

CONCLUSIONS OF LAW[4]

This court has jurisdiction over this action under 28 U.S.C. § 1332.

The first question to be considered is whether Illinois law or Swiss law governs the determination of the issues in this case.

[1] In a diversity action, the choice of law rules of the state in which the district court is located apply. *Klaxon Co. v. Stentor Co.*, 313 U.S. 487, 496, 61 S.Ct. 1020, 1021, 85 L.Ed. 1477 (1941). In Illinois, it is well established that the courts will look to the jurisdiction with the "most significant relationship" in determining the applicable law in tort cases. *Ingersoll v. Klein*, 46 Ill.2d 42, 45, 262 N.E.2d 593, 595 (1970); *Forty-Eight Insulations, Inc. v. Johns-Manville Products Corp.*, 472 F.Supp. 385, 391 (N.D.Ill.1979). Increasingly, Illinois courts have employed the "most significant relationship" approach in contract cases as well. *Ehrman v. Cook Electric Company*, 468 F.Supp. 98 (N.D.Ill. 1979).

[2] In determining which jurisdiction has the most significant relationship to a tort action, the court should consider: (1) the place of injury; (2) the place where the conduct causing injury occurred; (3) the domicile, place of incorporation, and place of business of the parties; and (4) the center of gravity of the parties' relationship. "[T]he contacts test is not an end in itself to be applied mechanically, but rather is a means reliably calculated to insure that the interests of the state with the most significant relationship to the occurrences will be protected." *Forty-Eight Insulations, supra*, at 391.

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[4] Any conclusion of law which may be more properly termed a finding of fact shall be deemed a finding of fact.

Plaintiff claims that Illinois law governs this entire action. Defendant Swiss Bank argues that some issues should be determined under Illinois law while others are more appropriately decided under Swiss law. Specifically, defendant claims that any liability it may have to plaintiff should be determined under Swiss law because Switzerland is the site of the alleged tort, defendant is located in Switzerland, and any relationship between defendant and plaintiff was created in Switzerland.

[3] In applying the "most significant relationship" test to the instant case, the court finds that Illinois law should govern all aspects of this action. Although Switzerland is the place where the conduct causing the injury occurred and is the defendant's place of business, all other elements point to Illinois. Both Hyman-Michaels and Continental are Illinois residents and conduct business in Illinois. The acts which resulted in Hyman-Michaels' loss were set in motion in Illinois. Illinois, as Hyman-Michaels' place of domicile, is the place where the alleged injury to plaintiff can be said to have occurred.

Finally, the center of gravity of the relationship between the parties is unquestionably Illinois. Hyman-Michaels, headquartered in Illinois, hired Continental in Illinois to make the transfer of funds necessary to effect the Charter payment. Because the payment had to be made in Switzerland, Continental used defendant Swiss Bank as its correspondent bank to transfer the funds by wire.

Illinois, as the place of incorporation and principal place of business of plaintiff, the principal place of business of third-party defendant Continental, and the center of the relationship of the parties, has the most significant relationship to this action with respect to all claims between the parties and with respect to the measure of any damages.

Plaintiff's complaint alleges breach of contract, negligence, and breach of fiduciary duty on the part of defendant Swiss Bank. Defendant claims that it owed no duty of care to plaintiff under either Swiss contract or tort law. Swiss law requires privity and thus precludes the imposition of liability to the owner on a correspondent bank.

[4] As discussed below, Illinois law does not require privity to establish the existence of a duty. It is undisputed, however, that a contract existed between plaintiff and Continental. Continental owed plaintiff a duty of care and Swiss Bank, as Continental's correspondent bank, owed plaintiff that same duty.

Although the Uniform Commercial Code ("U.C.C.") does not specifically address the problems of electronic fund transfers, courts have reasoned by analogy from concepts contained therein. In *Delbrueck & Co. v. Manufacturers Hanover Trust Company*, 609 F.2d 1047 (2d Cir. 1979), the court held that transfers of funds made via an electronic fund transfer system known as CHIPS (Clearing House Interbank Payments System) were irrevocable when made. The court found that the U.C.C. was not applicable to the case but stated that "analogous use of concepts such as the finality of checks once 'accepted' (§§ 3-410, 4-303) would support the irrevocability of these transfers." 609 F.2d at 1051.

An analogy may be drawn between the concept of "collecting bank" as found in Article 4 of the U.C.C. and Swiss Bank's role as a correspondent bank in the instant case. Under Section 4-201, a collecting bank's agency status with respect to the owner of an item is presumed prior to final

settlement of the item.[5] Similarly, a correspondent bank in a wire transfer transaction may be presumed to be an agent of the initiator of the transaction until such time as the transaction is completed. The court finds that Swiss Bank, as a correspondent bank in the subject transaction, was an agent of plaintiff and owed plaintiff the same duty of care as did Continental with whom plaintiff had an express contractual relationship.

[5] We turn now to plaintiff's negligence claim. Under Illinois law, a plaintiff in a negligence action must prove the existence of a duty owed by defendant to plaintiff, a breach of that duty, and an injury proximately resulting from the breach. The existence of such a duty is a question of law. *Cunis v. Brennan*, 56 Ill.2d 372, 308 N.E.2d 617 (1974).

[6] In determining whether a legal duty exists, the court must find that the occurrence involved was not simply foreseeable but that it was reasonably foreseeable. As stated by the Court in *Cunis:*

> . . . The creation of a legal duty requires more than a mere possibility of occurrence. Negligence as defined in the Restatement (Second) of Torts (1965), section 282, is conduct which falls below the standard established for the protection of others "against unreasonable risk of harm." Harper and James, in their Law of Torts, observe: "Not what actually happened, but what the reasonably prudent person would then have foreseen as likely to happen, is the key to the question of reasonableness." (2 Law of Torts (1956), sec. 16.9, at 929).

308 N.E.2d at 619.

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[5] U.C.C. § 4-201(1) provides in pertinent part:

> Unless a contrary intent clearly appears and prior to the time that a settlement given by a collecting bank for an item is or becomes final . . . the bank is an agent or subagent of the owner of the item. . . .

A collecting bank is "any bank handling the item for collection except the payor bank." U.C.C. § 4-105(d).

Other factors to be considered in determining whether a duty exists include "the likelihood of injury, the magnitude of the burden of guarding against it, and the consequences of placing that burden on the defendant. . . ." *Cross v. Chicago Housing Authority*, 74 Ill.App.3d 921, 925, 30 Ill.Dec. 544, 547, 393 N.E.2d 580, 583 (1st Dist. 1979).

[7] Plaintiff claims that Swiss Bank owed plaintiff a duty to transmit the wire transfer payment accurately and in a timely manner and that Swiss Bank breached that duty. Plaintiff contends that Swiss Bank negligently and carelessly failed to transmit the wire transfer payment in a timely manner after indicating that the telex message to transfer had been received on April 26, 1973.

Defendant argues that the injury suffered by plaintiff was not "reasonably foreseeable" because the telex machine employed by Continental to transmit the message in question is ordinarily used for foreign exchange transactions. Foreign exchange transactions require an interchange of information between Swiss Bank and the other party to the transaction. If a machine is out of paper, this interchange does not occur and there can be no damage to the customer. Defendant contends that, despite the fact that messages unrelated to foreign exchange transactions are received regularly on the foreign exchange machines, the unique facts of the subject occurrence were not foreseeable.

The court finds that defendant Swiss Bank owed a duty of care to plaintiff to maintain a system of receiving and disposing of telex messages upon which plaintiff could rely, and that Swiss Bank breached that duty. The first evidence of Swiss Bank's negligent procedures is the automatic answer back code on the telex machine in question, which continues to confirm the receipt of messages regardless of whether the content of the message is being recorded. The

fact that the machine is used primarily for foreign exchange transactions does not excuse defendant's negligent failure to monitor the paper supply of the machine.

Swiss Bank was also negligent in failing to institute a system for logging messages to insure that diverted messages (messages intended for other departments) were not lost or mishandled. Testimony by the head of Swiss Bank's foreign exchange department, Pierre Andre Adler, established that Swiss Bank failed to equip the machines in the foreign exchange department to produce carbon copies of incoming messages and also failed to adopt any system for registering diverted messages which would insure that they were sent to the correct department and properly acted upon. Such a cavalier attitude toward major transactions by a sophisticated international bank is shocking to the court.

The court rejects defendant's argument that three or four diverted messages per week is not sufficient notice of the potential risk involved to its non-foreign exchange customers. The evidence has shown that diverted messages may involve large sums of money and that, if such a message is lost or not acted upon promptly, the damages suffered by the initiator may be substantial.

The facts indicate an appalling lack of regard on the part of Swiss Bank for the more than reasonably foreseeable possibility that the negligent maintenance of its foreign exchange telex machines could result in substantial damage to one of its customers. The burden of guarding against such a possibility is minimal in view of the potential injury involved. As between Hyman-Michaels and Swiss Bank, the negligence and carelessness of Swiss Bank is the proximate cause of the loss suffered by plaintiff Hyman-Michaels.

Plaintiff also alleges breach of fiduciary duty on the part of defendant Swiss Bank. Plaintiff has failed to prove, however, the existence of such a duty.

[8, 9] The courts have invariably held that a fiduciary relationship exists only when confidence is reposed on one side and there is a resulting superiority and influence on the other side. *People ex rel. Barrett v. Central Republic Trust Co.*, 300 Ill. App. 297, 302-03, 20 N.E.2d 999, 1001-02 (1st Dist. 1939). Although plaintiff may have reposed confidence in Swiss Bank to the extent that anyone reposes trust and confidence in a commercial bank, there is no evidence that Swiss Bank exercised any superiority or influence over plaintiff. Swiss Bank's role in the transaction was that of correspondent bank to Continental and, as such, its relationship to plaintiff was governed solely by the contractual relationship which existed between plaintiff and Continental. Accordingly, the court finds that Swiss Bank did not breach any fiduciary duty to Hyman-Michaels in connection with Swiss Bank's failure to properly handle the telex payment order.

SWISS BANK'S THIRD-PART COMPLAINT

Swiss Bank filed a third-party complaint against Continental alleging that it is entitled to indemnity from Continental for any damages imposed on Swiss Bank in favor of plaintiff. Swiss Bank claims that Continental's actions were the primary and proximate cause of any loss or damage suffered by Hyman-Michaels in that: (1) Continental should have recommended a payment procedure to Hyman-Michaels that would have allowed more lead time for payment of the charter installment; (2) Continental carelessly and negligently sent the telex message of April 26, 1973 to the wrong telex machine; and (3) Continental was careless

and negligent in its actions subsequent to being advised on April 27, 1973 that the charter installment payment had not been made to the owner's account.

Third-party defendant Continental argues that, in order to prevail against Continental, Swiss Bank must prove as a matter of law (1) that Swiss Bank's negligence was only passive negligence and (2) that Continental's conduct constituted active negligence such that it was the major cause of the injury sustained by plaintiff.

At the time this case arose, no contribution among tortfeasors was allowed in Illinois.[6]

In *Carver* v. *Grossman*, 55 Ill.2d 507, 305 N.E.2d 161, 163 (1973), the court observed: "Where indemnity has been allowed the conduct of the indemnitor has usually been characterized as the primary cause or active negligence while that of the indemnitee has been characterized as the secondary cause or passive negligence." Although no precise definition of the term "active" negligence has been articulated by the Illinois courts, the facts of *Carver* clearly illustrate what is contemplated by the use of the term.

Plaintiff Carver was employed by a gasoline service station. The owner of the station, Bishop, drove the automobile of a customer into a service bay and instructed

[6] The law changed subsequent to 1973. *Skinner v. Reed-Prentice Division Package Machinery Co.*, 70 Ill.2d 1, 15 Ill.Dec. 829, 374 N.E.2d 437 (1978), permitted contribution among joint tortfeasors. In 1979, the Illinois legislature codified *Skinner* by expressly permitting actions for contribution among joint tortfeasors. The new Illinois statute and *Skinner* only apply, however, to causes of actions arising out of occurrences on and after March 1, 1978. *Ill.Rev.Stat.*, ch. 70, § 301 *et seq.* (1979); 70 Ill.2d at 17, 15 Ill.Dec. 829, 374 N.E.2d 437. Consequently, the only theory upon which Swiss Bank can recover damages from Continental is the theory of implied indemnity.

Carver to change the oil and the oil filter. When Bishop got out of the car, he turned the engine off, but left the transmission in gear and the keys in the ignition.

As Carver stood in front of the car, working under the hood, Bishop told the owner of the car to check his gas. The owner turned on the ignition and the car started and lurched forward, pinning Carver and causing him injuries.

Carver brought a common law negligence action against Grossman as administrator of the automobile owner's estate. Grossman filed a third-party complaint against Bishop, the employer, based on an implied indemnity theory. The complaint alleged that if the owner's estate was held liable to the original plaintiff, then the estate was entitled to full indemnification from Bishop because Bishop had been actively negligent and the owner had been passively negligent.

The trial court entered judgment against Bishop, the third-party defendant, in favor of Grossman, the third-party plaintiff, for the amount of a consent judgment previously entered against Grossman in favor of the original plaintiff. The Appellate Court affirmed. The Illinois Supreme Court reversed and remanded with directions, stating:

> We feel that the evidence in this case fails to establish Grossman's right to indemnity from Bishop, the owner of the service station, because the evidence clearly establishes that his decedent, Putnam, was himself guilty of active negligence.
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> * * * * * *
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> It was the negligent act of Putnam in starting the engine while the car was in gear without depressing the clutch or applying the brake that caused the car to move forward and strike Carver. We cannot character-

> ize this negligence as passive so as to permit the shifting of the entire responsibility from him to Bishop for injuries to which he very substantially contributed. It cannot be said that the principal or moving cause of the injury was the act of Bishop and that Putnam simply failed to discover or correct the situation which Bishop had created. Nor can Bishop be said to be the "principal wrongdoer" or the one whose wrong has been principally responsible for the injury. (Citations omitted)

305 N.E.2d at 163-164.

[10] The evidence in this case has failed to establish Swiss Bank's right to indemnification from Continental. Regardless of whether Continental had advised Hyman-Michaels to allow more lead time in initiating the charter installment payment, and Hyman-Michaels had in fact initiated the payment sooner, Swiss Bank's negligent procedures would have precluded either party from becoming aware of the non-payment until notification by the owner. Similarly, Continental's decision to retransmit the April 25 telex instruction to the machine in Swiss Bank's Foreign Exchange Department can hardly be characterized as the "primary cause" of plaintiff's injuries. The telex machine in question "answered back" that the message had been received. Once that transmittal was confirmed, Continental no longer had any control over the payment. There is no question that, but for Swiss Bank's negligence, Hyman-Michaels' losses would not have occurred.

The court finds that Continental's actions subsequent to April 27, 1973 are irrelevant. The facts simply do not allow the court to characterize Swiss Banks negligence as passive so as to permit the shifting of the entire responsibility for plaintiff's injuries to Continental.

THE COUNTERCLAIMS

Continental filed a counterclaim against Hyman-Michaels seeking recovery from Hyman-Michaels for all or part of the damages for which Continental might be found liable to Swiss Bank.[1] Continental, as well as Swiss Bank, contends that Hyman-Michaels is barred from recovery by its contributory negligence and assumption of the risk of delays.

[11] Defendants argue that the fact that plaintiff was previously involved in an arbitration proceeding, at which time it was put on notice that the payment provision of the Charter would be strictly enforced, required that plaintiff allow sufficient lead time in which to make the Charter payment. Defendants claim that because plaintiff knew that errors and delays may occur in the transmission of telex messages, plaintiff should have allowed even more lead time in making the Charter payment than the three days actually allowed.

The court concludes that plaintiff was not guilty of contributory negligence as a matter of law. The evidence shows that plaintiff initiated payment of the Charter installment at or about 9:17 A.M. on April 25, 1973, thereby allowing a three business day lead time for completion of the transaction. Plaintiff telephoned Continental at the aforementioned time and requested that a wire transfer of the funds be made to the account of the Pandora's owner at Banque de Paris. Payment of the installment was due at or before 2100 hours (9 P.M.) Geneva time on April 27, 1973.

The testimony at trial established that telex communication is essentially instantaneous. Although Continental waited until 4:36 P.M. (Chicago time) to send the telex message to its London branch for retransmission to Swiss

[1] Continental's motion to have its counterclaim treated as an affirmative defense is denied.

Bank, the message still reached London in time for the start of business on April 26.

Continental's London Branch retransmitted the telex message from Continental to Swiss Bank on the morning of April 26, 1973 and, according to the "answer-backs" received by Continental's London Branch operator, Swiss Bank received the retransmission at approximately 9:52 A.M. Geneva time. Swiss Bank had most of the business day of April 26 and all of April 27 in which to transmit the telex to Banque de Paris.

The court finds that three days was sufficient lead time for completion of the transaction in question. There is no evidence that a longer lead time would have insured a different outcome, given the customary procedures of the defendant banks. Continental issued its standard advice form to plaintiff confirming that plaintiff's account had been debited for the requested amount and that Continental was proceeding to execute the wire transfer.

Hyman-Michaels was entitled to assume that Continental and any correspondent bank employed by Continental would use due care in carrying out the transaction. Hyman-Michaels did not employ and was not obligated to employ a confirmation procedure independent of any employed by the banks executing the transaction. Consequently, Hyman-Michaels first learned of the non-receipt of the funds when notified by the owner of the Pandora of the withdrawal on April 27, 1973. Even with a longer lead time, plaintiff still would not have learned of the non-receipt of the nineteenth installment until notified by the owner on April 27.

Defendants also allege that Hyman-Michaels' claim is barred by the exculpatory provision on the reverse side of the Continental advice form. Plaintiff claims that it never signed or otherwise agreed to the supposed exculpatory

clause and that, in any event, the language in question applies only to Continental and not to liability asserted against its correspondent, Swiss Bank.[3]

[12] Under Illinois law, a court need not enforce a contractual clause exempting a party from liability for its own negligence unless "it is clear from the contract that the parties' intent was to shift the risk of loss" and it would not be against the "settled public policy of the state to do so...." *Rutter v. Arlington Park Jockey Club*, 510 F.2d 1065 (7th Cir. 1975); *citing Jackson v. First National Bank*, 415 Ill. 453, 460, 114 N.E.2d 721, 725 (1953).

[13] After considering all the evidence, the court finds that there was no intent on the part of Hyman-Michael's to shift the risk of loss. The transaction in question was consummated over the telephone. Continental's advice form was merely a confirmation that the transaction had been carried out as requested. None of the employees or officers of Hyman-Michaels ever signed the advice form and there is no evidence that the exculpatory clause was ever brought to their attention.

Although Illinois courts have often upheld exculpatory clauses relieving a party from liability for negligence in performing a contractual obligation, the cases involve agreements signed by both parties in which the intent to accept such a clause is clear. *See e. g., Rutter v. Arlington Park*

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[3] The clause in question provides as follows:

> It is fully understood and agreed that no liability shall attach to the Continental Illinois National Bank and Trust Company of Chicago (hereinafter referred to as Bank), nor to its correspondents, for any loss or damage occasioned by delay in, failure of, or error in cable, telegraph, or telex transmission of messages, or error in identification of payee, or by acts or omissions of correspondents or agencies employed by the Bank, or for any cause beyond Bank's reasonable control.

Jockey Club, supra; Morrow v. Auto Championship Racing Association, Inc., 8 Ill.App.3d 682, 291 N.E.2d 30 (1972); *Owen v. Vic Tanny's Enterprises*, 48 Ill.App.2d 344, 199 N.E.2d 280 (1964).

Continental's advice form may be likened to an adhesion contract in which a consumer has no choice but to accept an exculpatory provision. Because the exculpatory clause is part of a standard form contract, its validity is open to question. In the instant case, however, the court finds only that Hyman-Michaels' claim is not barred by the exculpatory clause of the advice form because there is no evidence that Hyman-Michaels was aware of or accepted that provision of the contract.

In response to Continental's counterclaim, Hyman-Michaels filed a counterclaim against Continental, alleging negligence, breach of contract, and breach of fiduciary duty. As previously discussed, the court finds no liability on the part of Continental for any injury suffered by plaintiff in this action.

DAMAGES

The final issue to be resolved is the extent of the damages to which plaintiff is entitled. Plaintiff claims it is entitled to profits lost as a result of the withdrawal of the Pandora, as well as costs and attorney's fees for the 1973 arbitration. Defendant Swiss Bank argues that it should not be held accountable for damages which it could not have foreseen.

Swiss Bank contends that, under contract theory, the lost profits claimed by Hyman-Michaels are consequential or special damages. Swiss Bank relies on the traditional rule first announced in *Hadley v. Baxendale*, 9 Exch. 341 (1854). In *Hadley*, the Court of Exchequer held that consequential damages may include only those "as may reasonably be

supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." Because Swiss Bank did not know the details of the transaction in question, it claims that Hyman-Michaels should be denied lost profits as part of the damages awarded.

[14, 15] Lost profits are an appropriate item of damages where there is a causal connection between defendant's conduct and plaintiff's injury and where the amount of the damages can be determined with reasonable certainty. *See Mercury Cleaning Systems, Inc. v. Manitowoc Engineering Corp.*, 255 F.2d 318 (7th Cir. 1958). As discussed above, the conduct of Swiss Bank was clearly the proximate cause of plaintiff's injury. The expert testimony of plaintiff's witness, Haas, demonstrated to the court's satisfaction that plaintiff's lost profits can be calculated with reasonable certainty. Thus, plaintiff is entitled to damages for the profits it lost due to the withdrawal of the Pandora.

Swiss Bank's argument that the extent of plaintiff's injury was not foreseeable is unpersuasive. The fact that plaintiff was transferring funds by wire rather than through the mail was sufficient to alert Swiss Bank to the importance of the transaction. In addition, Swiss Bank was aware of the fact that the telex machines in the Foreign Exchange Department were receiving three or four diverted messages per week which could involve large sums of money. Swiss Bank, as a major international bank, could reasonably foresee that failure to act promptly upon receipt of such a telex message could result in substantial damage to a customer of the bank.

[16] Swiss Bank also claims that the proper measure of damages for the loss of the Pandora is the replacement cost of the vessel. Swiss Bank argues that Hyman-Michaels could have substantially reduced its losses if it had hired

a vessel to replace the Pandora, and that Hyman-Michaels had a duty to do so.

Hyman-Michaels claims that it has no duty to cover or mitigate where to do so creates a substantial risk of further damages. In addition, plaintiff claims that defendants' computation of damages, using a replacement cost analysis, greatly undervalued plaintiff's damages.

In *Toyota Industrial Trucks U.S.A., Inc. v. Citizens National Bank of Evans City*, 611 F.2d 465 (3rd Cir. 1979), one of the issues before the court was whether a seller is required to mitigate any damages it incurs by virtue of a wrongful dishonor of drafts submitted pursuant to a letter of credit. In discussing the concept of "duty to mitigate", the court stated:

> The term "duty to mitigate" damages has been interpreted to mean that "damages which the plaintiff might have avoided with reasonable effort without undue risk, expense, or humiliation are either not caused by the defendant's wrong or need not have been, and therefore, are not to be charged against him." 11 Williston on Contracts, § 1353 at 274 (3d ed. 1968). When mitigation is appropriate, the test to be applied to the plaintiff's conduct is whether the conduct taken in response to the defendant's breach was reasonable. (Citations omitted). Reasonable conduct "is to be determined from all the facts and circumstances of each case, and must be judged in the light of one viewing the situation at the time the problem was presented." (Citations omitted).

611 F.2d at 471.

The evidence has shown that Hyman-Michaels would have assumed a substantial additional risk had it undertaken to charter a replacement vessel at the time it lost the Pandora. By April of 1973, shipping rates were one hundred percent higher than they had been when plaintiff entered into the Pandora charter. Although the rates, in fact, con-

tinued to increase for a period of time after April of 1973, plaintiff's decision not to re-charter was reasonable at the time the problem was presented. Because of the undue risk involved, plaintiff was under no duty to mitigate damages.

[17] Hyman-Michaels also seeks to recover $15,952.65 in attorneys' fees which it incurred in the second arbitration proceeding. Defendant claims that plaintiff is not entitled to recover these fees. Defendant relies on *Garris v. Schwartz*, 551 F.2d 156, 159 (7th Cir. 1977), which held that "as a general rule under Illinois law, attorneys' fees and expenses are not recoverable as an element of damages in a suit brought to enforce a common law duty" unless plaintiff's complaint fits a recognized exception to that rule.

Plaintiff in *Garris* was attempting to recover fees incurred in litigation, caused by defendant, between plaintiff and a third party. The court found that recent decisions of the Illinois Appellate Court extended the general rule quoted above to exclude recovery of attorneys' fees and expenses incurred in litigation with third parties. 551 F.2d at 158.

A recent Illinois Appellate Court case specifically rejects the interpretation of Illinois law set forth in *Garris*. In *Sorenson v. Fio Rito*, 90 Ill.App.3d 368, 45 Ill.Dec. 714, 718-19, 413 N.E.2d 47, 51-52 (1st Dist., 1980), the court held that plaintiff could recover her attorneys' fees, stating:

> The general rule in Illinois is that one who commits an illegal or wrongful act is liable for all of the ordinary and natural consequences of his act. (*Philpot v. Taylor*, (1874), 75 Ill. 309; *Bimba Mfgr. Co. v. Starz Cylinder Co.* (1969), 119 Ill.App.2d 251, 256 N.E.2d 357; 15 Ill.L. & Prac. *Damages*, § 32 (1968).) Logically, this would include any attorneys' fees expended in bringing a lawsuit against the wrongdoer. However, because it was felt that the allowance of attorneys' fees would deter

a litigant from prosecuting or defending an uncertain claim, the "American Rule" was adopted as an exception to the general rule. The Supreme Court stated the rationale for the "American Rule" as follows:

> In support of the American Rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that from instituting actions to vindicate their rights if the penalty for losing included the fees of their opponents' counsel. *Fleischmann Distilling Corp. v. Maier Brewing Co.* (1967), 386 U.S. 714, 718 [87 S.Ct. 1404, 1407, 18 L.Ed.2d 475].

It is clear from this statement that the policy against awarding attorneys' fees was intended to apply only where a successful litigant seeks to recover his costs in maintaining the lawsuit. *We do not believe it was intended to preclude a plaintiff from recovering losses directly caused by the defendant's conduct simply because those losses happen to take the form of attorneys' fees.* The plaintiff here is not attempting to recover the attorneys' fees she expended in bringing this lawsuit. Rather, she seeks to recover losses incurred in trying to obtain refunds of tax penalties which were assessed against her solely as a result of the defendant's negligence. Had the plaintiff been forced to hire an accountant to repair the damage caused by the defendants' conduct, she would undoubtedly have been entitled to recover the accountant's fee as an ordinary element of damages. There is no basis in logic for denying recovery of the same type of loss merely because the plaintiff required an attorney instead of an accountant to correct the situation caused by the defendant's neglect. In holding the defendant liable for the plaintiff's losses, we are not violating the policy against 'penalizing' a litigant for defending a lawsuit. We are simply following the general rule of requiring a wrongdoer to bear the consequences of his misconduct. (Emphasis added).

The reasoning of *Sorenson* is particularly applicable to the instant case. Hyman-Michaels is not seeking to recover

attorneys' fees incurred in this litigation. Rather, Hyman-Michaels is seeking to recover all the damages it suffered as a result of Swiss Bank's negligence. The attorneys' fees incurred by Hyman-Michaels in the second arbitration are an appropriate part of those damages and are not unreasonable in view of the amount of work involved.

Finally, Hyman-Michaels is entitled to one hundred percent of its damages. There is no evidence that the Pandora was part of the joint venture agreement between Hyman-Michaels and Schiavone-Bonomo or that such was even the intent of the parties.

Accordingly, it is ordered that judgment be and the same is hereby entered in favor of plaintiff Hyman-Michaels and against Swiss Bank in the amount of Two Million One Hundred Thirty Seven Seven Hundred Thirty One and 65/100 Dollars ($2,137,731.65) plus costs.*

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*Loss of net earnings was computed by Hyman-Michaels as follows:

M/V PANDORA—LOSS DUE TO WITHDRAWAL OF VESSEL

Cost if Charter had continued		$ 894,650
Earnings if Charter had continued*		
5/30-7/29 61 days at $5000 =	$ 305,000	
7/30-9/29 62 days at $5967 =	369,954	
9/30-11/29 61 days at $6040 =	368,440	
11/30-1/29/74 61 days at $7100 =	433,100	
1/30-3/29 59 days at $6710 =	395,890	
3/30-8/27 151 days at $7570 =	1,143,070	
Total estimated revenue		$3,015,454
Loss of net earnings		$2,120,804

* Estimated daily revenue is based on actual reported fixtures on roundtrips for the dates corresponding to the above periods. The fixtures were reported in the Maritime Research, Inc. Bulletin with the exception of the last period (3/30-8/27 1974) which is based on Hyman-Michaels charter of the M/V STOMOLEON for a period of 6 months.

Total amounts of damages caused by loss of Pandora:

Lost profits	$2,120,804.00
Attorney's fees for 1973 arbitration	15,952.65
Fees paid for arbitration	975.00
	$2,137,731.65

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

CORRECTED—June 24, 1982
June 23, 1982

Before

Hon. LUTHER M. SWYGERT, Senior Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge

EVRA CORPORATION, formerly HYMAN-MICHAELS COMPANY,
Plaintiff-Appellee and
Counterplaintiff-Appellant,

vs.

Nos. 81-1925
81-1926

SWISS BANK CORPORATION,
Defendant-Appellant and
Third-Party-Plaintiff-Appellant,

vs.

CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,
Third-Party-Defendant-Appellee and Counterdefendant-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 78-C-2643

Stanley J. Roszkowski, *Judge.*

ORDER

On April 16, 1982, EVRA Corporation filed a petition for rehearing with suggestion for rehearing en banc. All of the judges of the original panel have voted to deny the petition, and none of the active members of the court has requested a vote on the petition.* The petition is therefore DENIED.

* Chief Judge Walter J. Cummings and Circuit Judge Richard D. Cudahy did not participate in the consideration of the suggestion for rehearing en banc.